



Conseil des Communes et Régions d'Europe
Council of European Municipalities and Regions

**Public hearing on the Commission's proposal for a
new public procurement directive
On simplification and public-public cooperation**

Dear Chairman,

Dear members of the European Parliament,

Dear Ladies and Gentlemen,

First of all, let me thank the Committee for the organisation of this hearing on this very important legislative proposal and thank you for giving the floor to a representative of local and regional government.

The Council of European Municipalities and Regions, the CEMR, is the European umbrella organisation representing the national local and regional government associations. At the moment our membership comprises 60 associations from 40 countries.

The European public procurement directives are of great importance to our members, since a considerable amount of public procurement is done by local and regional authorities.

In recent years, our members experience is that the public procurement rules have become increasingly complex, difficult to apply, time consuming and costly for both the tendering authorities and the bidders.

Therefore, and in order to raise awareness of this issue, the CEMR issued a paper on 'the over-reliance on public procurement as a policy instrument' in 2010, highlighting the critical aspects that have led to this situation. We noted for example an unwelcome shift away from 'value for money' objectives in favour of contracts which, whilst perhaps more expensive, ensured legal certainty.

We appreciate that the European Parliament shared many of our concerns in its 2011 resolution and in particular the common understanding that simplification of the rules is needed.

On simplification

However, the Commission's proposal from December 2011 does not achieve this simplification objective. On the contrary, it even goes beyond what is proportionate and to a large extent it is against the principle of subsidiarity. The draft directive provides very detailed provisions on a number of issues, which – according to our opinion – do not need to be regulated to that extent at the European level.

There is a fatigue of too detailed European prescription and what is needed is less, not more administration and regulation.

This is also confirmed by the last European Council meeting on 1&2 March, who stressed in its conclusions that work must continue in order to reduce administrative and regulatory burdens at EU and national level.

The Council invites the Commission to consider sectoral targets – we believe that the public procurement proposal would be a good occasion for the European legislator to set a valuable example.

Just to give you some concrete examples of new burdens the text proposes:

- New advertising requirements for social and other specific services (article 75)
- New procedures at national level for these services (article 76)
- Creation of new monitoring bodies at national level (article 84)
- Additional explanations in relation to the contract value chosen (article 44)
- Heavy individual reporting and notification obligations, directly to the Commission (articles 32, 85 and 86).
- New procurement procedures concerning credit (loan) services (article 10 (d)), and new procedures concerning legal services.

Again, we believe that this is disproportionate and against the principle of subsidiarity. We need less than the 246 pages of regulation proposed: not more. We also question the directive to be the result of 'smart regulation' – an objective that the European Commission adopted to follow.

Furthermore, some provisions have the character of guidelines for implementation and should not be part of a legislative text.

Such elements should be provided in a separate, accompanying communication or handbook, which allows further modifications over time to keep up with the fast pace of CJEU procurement case law, and allow a simpler legislative text.

Therefore, we call on the European Parliament and the Member States to take a bold approach and eliminate all the provisions which are too detailed.

It is important to highlight that local and regional government as public procurers fully endorse the need for open competition, and fully endorse the need to create a simpler regime particularly for SMEs. Public authorities fully subscribe to the Treaty principles of equality, transparency and non-discrimination.

However, consistently applying the complex rules of the European directives, and the European timescales, without receiving any offer at all from providers in another member state means a waste of resources and costs: the complex EU regime is not proportionate to the results being achieved. The EU's own figures show only 1.6% of contracts are finally awarded to a company in another member state.

How can simplification be achieved?

There are different approaches that can be considered:

- 1) An increase of the thresholds for goods and services would help tremendously to reduce time and costs burdens on both sides: the tendering authorities and the bidders;
- 2) A European framework directive with a focus on the Treaty principles: We consider the WTO Government Procurement Agreement (GPA) with its 24 articles to be an excellent model for such a 'light' regime and more flexible procedures. Since both regimes (EU and WTO) must be consistent, we encourage the European legislator to now align the Commission's proposed directive to the GPA.
- 3) Increasing awareness and incentives to look for innovative solutions (in particular e-procurement).

We therefore strongly urge the European Parliament to take a brave step in the right direction, aiming at a 'light' EU procurement regime with incentives for innovative solutions. The "sticks" in the form of detailed legal provisions have not resulted in the desired success – let's try the "carrots" approach by reducing legal and administrative burdens and liberating capacity by harnessing the potential of e-procurement.

On public-public cooperation

It is crucial that public authorities can work freely together to deliver innovative public services.

Inter-communal or other public-public cooperation arrangements are not subject to public tendering procedures. Recent ECJ rulings provided clarification on this issue and the European Parliament in its 2011 resolution contains a clear statement in this regard.

Article 11.4 outlines the Commission's interpretation of the Court's case law, but we consider this should not be a part of the directive. Furthermore, we believe that the proposal assumes too strict an interpretation of the case law.

The proposal makes 'mutual rights and obligations' a decisive condition that must be fulfilled to exempt public-public cooperation from the procurement rules. By doing so it does not cover many forms of public-public cooperation used in practice.

Imposing joint 'mutual rights and obligations' is overly restrictive, difficult to define, open to abuse, and does not reflect current practice. Such a requirement does not appear in the official summary of the landmark *Stadtreinigung Hamburg* case (480/06) and it would thus be incorrect to codify it as decisive in this way.

CEMR notes that such 'reciprocity' requirements are not imposed when a new legal entity is created to deliver the service. Therefore, no such 'reciprocity' requirements should be imposed when no new legal entity is created.

There must be an equal approach from the Commission irrespective of the form of public-public cooperation chosen in line with the Court's conclusion in *Hamburg* para 47: 'first, Community law does not require public authorities to use any particular legal form in order to carry out jointly their public service tasks.

Secondly, such cooperation between public authorities does not undermine the principal objective of the Community rules on public procurement'.

By ignoring this, and imposing new limitations, the Commission infringes Member States' freedom to decide how best their public administration should be organised.

CEMR believes that the wording of the European Parliament's resolution of October 2011 perfectly reflects the jurisprudence of the CJEU and should be used for the text in the directive.

The resolution underlines the fact that transferring tasks between public sector organisations is a matter for the Member States internal administrative organisation and not subject to procurement rules.

Proposal for amendment

CEMR proposes to add to article 1 of the directive (subject matter and scope): "the directive does not apply on public-public cooperation as long as the following criteria are met:

- the purpose of the partnership is the provision of a public-service task conferred on all the public authorities;
- the task is carried out solely by the public authorities concerned; i.e. without the involvement of private capital;
- the activity involved is essentially performed on behalf of the public authorities concerned

We hope that the European Parliament will consider our proposal on public-public cooperation and remain consistent with its resolution, adopted only five months ago.

Conclusion

To conclude, let me pass on to you the wish and expectations from local and regional government that this new directive should aim to make public procurement easier, not more burdensome and costly, for both the procuring authority and the bidders.

I thank you for your attention.

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